

6 Official Opinions of the Compliance Board 35 (2008)

**ADMINISTRATIVE FUNCTION – OUTSIDE EXCLUSION
– ISSUANCE OF QUITCLAIM DEED TRANSFERRING
COUNTY PROPERTY INTEREST – EXCEPTIONS
PERMITTING CLOSED SESSION – LEGAL ADVICE –
CONSEQUENCES OF PROVIDING QUITCLAIM DEED –
COMPLIANCE BOARD – AUTHORITY AND
PROCEDURES – COMPLAINT – LEVEL OF SPECIFICITY**

June 23, 2008

William Mossburg, III

The Open Meetings Compliance Board has considered your complaint alleging a violation of the Open Meetings Act by the Frederick County government. Based on the record before us, we deem the complaint to concern a meeting of the Board of County Commissioners with staff of the Office of County Attorney concerning the issuance of a quitclaim deed. For the reasons explained below, assuming that the discussion was limited to the legal consequences of the transaction, we find no violation.

I

Complaint and Response

According to the complaint, an “improper secret meeting” occurred on some date apparently before December 20, 2007, concerning a land transaction with Frederick County and your attempt to secure a refund of payment for the land.

The complaint indicated that in 2004, you approached Frederick County about acquiring a certain parcel of property. You were instructed to write to Douglas Browning, then-County Manager. Following a public hearing, you apparently purchased the property. Later, issues about ownership arose, and you sought a refund of your payment. After you met with several county officials, you were instructed to submit your request for a refund in writing to Ronald Hart, County Manager, which you did on October 22, 2007.

At some point, you were informed by staff in the County Manager's Office that there would be a meeting and you would be informed of the time so that you could attend. However, according to the complaint, you were subsequently informed that "it was going to be a closed meeting and that [you] would not be allowed to attend" (emphasis in original). You indicated that no reason was given for the "secret" meeting.

In a timely response,¹ John S. Mathias, County Attorney for Frederick County, argued that the complaint failed to allege any violation of the Open Meetings Act. Furthermore, he denied that the Board of County Commissioners violated the Act. The response pointed out that the complaint referred specifically only to one gathering, involving the President of the Board of County Commissioners, County Manager, and Deputy County Attorney. This, the response contended, was not a "meeting" governed by the Open Meetings Act in that it did not involve a "quorum" of a "public body." As to the subsequent meeting that the complainant indicated he "would not be allowed to attend," the response noted that the complaint "cannot be considered as 'alleging a violation'" of the Open Meetings Act. Citing §10-502.5(b)(2),² the response noted that a complaint must "identify the public body, specify the action of the public body, the date of the action, and the circumstances of the action." The response also cited the Compliance Board's instructions for filing a complaint, which provide, in part, that a complainant is to "[t]ell the Compliance Board what public body is involved, what happened, what the date was and what possible violation you're concerned about."³ According to the response, the complaint failed to include any of this information. The response stated that the Compliance Board should opine that "the information provided is insufficient to constitute a complaint."

The response also claimed that the Board of County Commissioners did not violate the Act. In fact, the Board of County Commissioners was never mentioned in the complaint; the complaint only referred to "Frederick County" and "Frederick County Government." The response did note that the complaint may have involved the actions of the County Commissioners in providing the complainant a quitclaim deed for certain property. However, according to the response, the County Commissioners action would have involved an administrative function outside the scope of the Act. §10-503(a)(1)(i). In dealing with the complainant's property issues, "the Board of County Commissioners was administering a law – primarily the laws governing tax sales ... [and] laws authorizing the Board of County Commissioners to transfer any property interest"

¹ The Compliance Board granted the County Attorney's Office a brief extension of time in which to submit a response.

² All statutory references are to the Open Meetings Act, Title 10, Subtitle 5 of the State Government Article, Annotated Code of Maryland.

³ Available at <http://www.oag.state.md.us/Opengov/Openmeetings/complaint.htm>.

The response asserted, however, that although the Board of County Commissioners performed an administrative function, the Board nevertheless “conducted virtually all of its meetings concerning [the] quitclaim deed in open session ... On one occasion, in an abundance of caution, the Board of County Commissioners followed all of the procedures for a closed session ... and met with County staff to ‘consider the acquisition of real property for a public purpose and matters directly related thereto’ and to ‘consult with counsel to obtain legal advice.’” During the course of this session, the County Commissioners met with attorneys from the County Attorney’s Office and other staff to discuss the legal consequences involved in providing a quitclaim deed for the land sought by the complainant.⁴

When we initially reviewed the complaint, we assumed from the phrasing of the letter and the nature of the underlying transaction that the public body alleged to have violated the Act was the Board of County Commissioners of Frederick County. After receiving the response, we requested explicit confirmation that the complaint was so intended. You confirmed this.

II

Analysis

A. Adequacy of the Complaint

The County Attorney correctly recited the basic information that is to be included in a complaint. However, we do not agree that this complaint falls so short as to warrant dismissal. Although the complaint provided little detail as to the specific meeting alleged to have violated the Act, the complaint did provide a time frame during which the meeting allegedly occurred and the subject of the meeting. While our ability to evaluate a complaint is enhanced when the complainant can provide a more exact description, a complainant might not have access to the exact details. Such information might be available only to the public body and its staff. In some cases, to require a complainant to produce this detail would close the door to the informal process that the General Assembly intended through the establishment of the Compliance Board. In this case, we interpret the complaint about a closed meeting as alleging a violation of §§10-505 and 10-507(a) of the Act.

We agree with the County Attorney that a complaint must identify the public body that is alleged to have violated the Act. Based on the complainant’s references to the Frederick County Government and the nature of the underlying transaction, which manifestly fell within the purview of the Board of County Commissioners, we took it for granted that the complaint was aimed at the Board. *Cf. City of Bowie v. County Comm’rs of Prince George’s County*, 258 Md. 454, 461 (1970) (Board of

⁴ The complainant and County differed in their characterization of the land transaction. However, we shall address only the allegations relating to the Open Meetings Act; we express no views on any aspect of the underlying transaction.

County Commissioners act as both legislative and executive branch of commission form of county government). In retrospect, we should have confirmed our assumption immediately after receiving the complaint. However, confirmed it has belatedly been, and dismissing the complaint now would be pointless.

B. Application of the Act

Any gathering of the President of the Board of County Commissioners, the Deputy County Attorney, and the County Manager was not governed by the Open Meetings Act, because it did not involve a quorum of a public body. *See* §10-502(h). The latter two individuals are County employees and not members of a public body. Thus, their actions were not governed by the Open Meetings Act. Commissioner Gardner, while a member of the Board of County Commissioners, could not violate the Act by attending a meeting with employees when a quorum of the Board was not present. §10-502(g).

The County's response identified a specific closed meeting involving the Board of County Commissioners and legal staff from the County Attorney's Office, at which the legal consequences of providing a quitclaim deed were discussed. The response argued that this meeting involved an administrative function to which the Open Meetings Act does not apply. §10-503(a)(1)(i). Nevertheless, we were also told that, in an abundance of caution, the meeting was properly closed in accordance with the provisions of the Act. It is in connection with this session that we evaluate application of the Act.

We first address the suggestion that this session involved an administrative function. The County Commissioners, the County's attorneys, and other staff discussed the "legal consequences involved in providing [the complainant] the quitclaim deed he had requested." According to the response, the Commissioners were administering laws governing tax sales as well as laws authorizing the County Commissioners to transfer any property interest. We have often addressed at length the standard for determining whether a matter qualifies as an administrative function under the Act, so it is not necessary that we repeat a detailed discussion here. As we recently summarized, determination of an administrative function under the Act involves a two-step analysis. First, we ask whether the topic of discussion falls within the definition of any other defined function. If so, our analysis stops because, by definition, the topic could not be considered an administrative function. 6 *OMCB Opinions* 23, 26 (2008). If the topic of discussion does not involve another defined function, we then consider whether the public body was involved in the "administration of" an existing law, rule, or policy. If not, the topic of discussion is not an administrative function. *Id.*

Although real property transactions have special attributes, an exchange of money for an interest in land involves a contract. *Restatement (Second) of Contracts* §127 (1981). As we see it, a discussion about the legal issues related to issuance of a quitclaim deed to the complainant involved preliminary considerations of a contractual transaction – a quasi-legislative function as defined in the Act. §10-502(j). Therefore, the discussion could not be considered an administrative function outside the scope of the Act. §§10-502(b)(2)(v).

C. *Closure Under the Act*

Because this session was governed by the Open Meetings Act, we evaluate whether the meeting was within one or more of the Act's exceptions allowing for a closed session. The County's response mentioned two exceptions: to "consider the acquisition of real property for a public purpose and matters related thereto," §10-508(a)(3); and to "consult with counsel to obtain legal advice," §10-508(a)(7).⁵ In considering the application of any exception under the Act allowing closure of a meeting, we adhere to Act's requirement that each exception be strictly construed. §10-508(c).

Section 10-508(a)(3) allows a public body to close a meeting to consider the *acquisition* of real property for a public purpose. However, this exception would not extend to the *transfer* of whatever property interest the County may have had in the property. As we understand the facts, that is what was addressed in this meeting.

However, the Commissioners also cited the provision allowing a meeting to be closed "to consult with counsel to obtain legal advice." As described in the response, the Commissioners met with representatives of the County Attorney's Office and other county staff to discuss "the legal consequences involved in providing ... the quitclaim deed [the complainant] had requested." If the procedural requirements of the Act were followed⁶ and discussion was limited to this purpose, the Commissioners clearly had a right to hold this closed meeting under the relevant exception in the Act.

⁵ While the response referred to §10-508(a)(5), that reference was obviously a typographical error in that it is clear the Commissioners were seeking counsel's advice in connection with the transfer of the property to the complainant.

⁶ The complaint did not allege any procedural violation under the Open Meetings Act, and the response indicated that "all of the procedures for a closed session" were followed.

III

Conclusion

The Board of County Commissioners' meeting with members of the Office of County Attorney and other staff concerning the issuance of a quitclaim deed sought by the complainant was subject to the Open Meetings Act. However, the County Commissioners were justified in closing the meeting under §10-508(a)(7), provided that discussion was limited to the legal consequences of the transaction.

OPEN MEETINGS COMPLIANCE BOARD

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